FEB 21 1974

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Petitioners,
v.
CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION TO AMICUS CURIAE BRIEFS OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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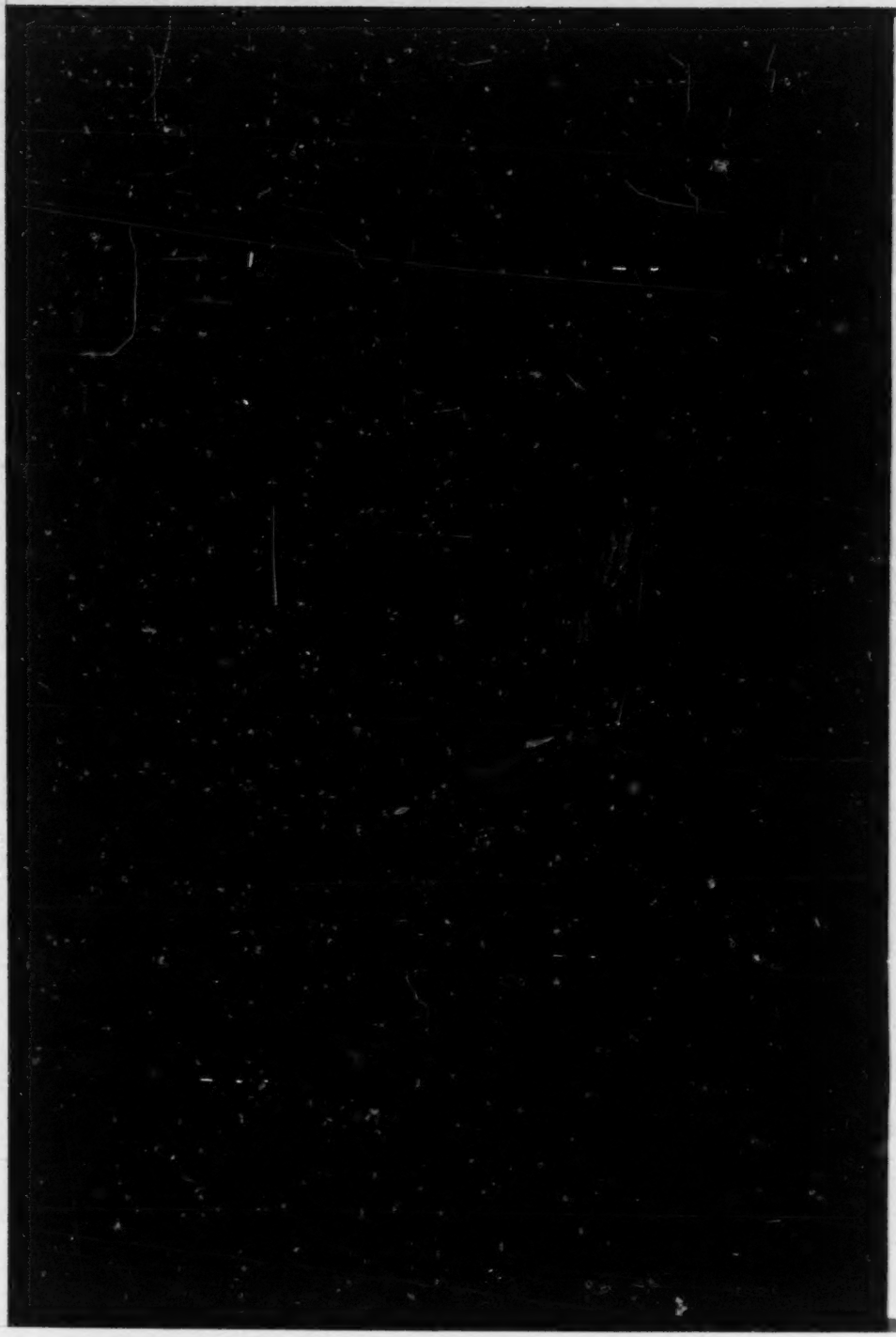
February 19, 1974

UNIVERSITY OF WASHINGTON, DEPARTMENT OF PRINTING



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AUTHORITY FOR THIS BRIEF

This brief is submitted in accordance with the provisions of Supreme Court Rule 41(3) and (5) and pursuant to the understanding concurred in by the Clerk of the Court that respondents would be permitted to submit a reply brief in accordance with Rule 41(3) to respond to any new matters raised by the briefs of the Anti-Defamation League of B'nai

B'rith (herein referred to as ADL) and the American Federation of Labor and Congress of Industrial Organizations (herein referred to as AFL-CIO), *amici curiae*, who, with the consent of the parties, served their briefs on the respondents on January 29, 1974, and January 21, 1974, respectively, well after the regular date for the filing of said briefs in support of the petitioners and too late to be adequately considered in the respondents' opposing brief on the merits.

ARGUMENT

I

INTRODUCTION

In addition to the briefs submitted by the parties in this matter, this Court has been afforded an unusual number of *amicus* briefs by an unusual variety of *amici* which indicates the importance of the decision of this Court in this matter and the effect its decision will have on individuals and interests that span virtually all aspects of contemporary American life.

Thus, we find *amici* supporting the petitioners that include not only the Anti-Defamation League of B'nai B'rith but the American Jewish Congress, the Jewish Rights Council, and the American Jewish Committee, as well as the Advocate Society, representing a group of Polish attorneys in Chicago, and the Joint Civic Committee of Italian-Americans, and UNICO National, representing organized Italian ethnic interests. Yet, it can be seen that even ethnic groups who may, understandably, feel concerned over a minority admissions program in higher education which favorably considers other minorities who are under-represented within the legal profession, show no unanimity in the nature of their concern. For

example, the National Council of Jewish Women and the Union of American Hebrew Congregations, Commission on Social Action, have joined in the *amicus* brief of the Children's Defense Fund (herein referred to as CHILDREN'S DEFENSE FUND) in support of the respondents.

Similarly, while we find the AFL-CIO appearing *amicus curiae* in support of the petitioners, we find international labor organizations, some of whom are affiliated with the AFL-CIO, *e.g.*, the United Auto Workers, the United Mine Workers, the International Union of the American Federation of State, County and Municipal Employees, and the United Farm Workers of America, supporting the respondents by their appearance on the *amicus* brief of the Children's Defense Fund.[1]

Law schools and higher education generally,[2] as well as the legal profession,[3] have submitted briefs in support of the

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1. The United States Chamber of Commerce seeks appearance on behalf of the petitioners as *amicus curiae*. Since its request was not received by respondents until after our brief had been submitted to the printer, we declined to consent to the filing of that brief. A copy of our letter of denial of consent is attached as Appendix A.

2. See, *e.g.*, Brief of the President and Fellows of Harvard, *amicus curiae* (herein referred to as HARVARD); Brief of a group of Law School Deans (60), *amici* (herein referred to as DEANS); Brief of the American Association of Law Schools, *amicus* (herein referred to as AALS); Brief of American Association of Medical Schools, *amicus;* Brief of Rutgers University, *amicus* (herein referred to as RUTGERS); Brief of the National Organization of Women, *amicus,* in which the National Education Association has joined (herein referred to as NOW); Brief of the Deans of Antioch College, *amici* (herein referred to as ANTIOCH); Brief of the Center for Law and Education, Harvard University, *amicus* (herein referred to as CENTER); Brief of the Council on Legal Education Opportunity, *amicus* (herein referred to as CLEO).

3. See, *e.g.*, Brief of American Bar Association, *amicus* (herein referred to as ABA); Brief of Lawyers Committee for Civil Rights Under Law, *amicus* (herein referred to as LCCR); Brief of National Conference of Black Lawyers, *amicus* (herein referred to as BLACK LAWYERS); Brief of Legal Aid Society of Alameda County et al., *amici* (herein referred to as LEGAL AID).

respondents' admissions program. National associations representing women, Blacks, Japanese-Americans, Mexican-Americans, Puerto Rican-Americans, and Indian-Americans, have all either submitted briefs or joined the briefs of others in support of the respondents' admissions program.[4]

In addition, respondents have been supported by the State of Ohio[5] and the City of Seattle,[6] concerned governments which recognize the effect a reversal in this case would have on their vital governmental functions.

We believe these briefs, together with the respondents' opposing brief on the merits, adequately respond to all of the arguments made by the *amici* Anti-Defamation League of B'nai B'rith and American Federation of Labor and Congress of Industrial Organizations in support of petitioners. It is not our intention here to repeat arguments already made but simply to call this Court's attention to the way the ADL misidentifies the issue in question. We also wish to call the Court's attention to some of the arguments of the *amici* supporting the respondents which are particularly responsive to the apparent quest of the AFL-CIO to use this case to achieve reversal of Courts of Appeals' decisions upholding affirmative action programs in the construction trades.

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4. See, *e.g.*, CHILDREN'S DEFENSE FUND; Brief of the NAACP Legal Defense and Educational Fund, Inc., *amicus* (herein referred to as NAACP, INC.); Brief of the American-Indian Law Students Association et al., *amici* (herein referred to as INDIAN-AMERICANS); Briet of the Mexican-American Legal Defense and Educational Fund et al., *amici* (referred to herein as MEXICAN-AMERICAN.)

5. Brief of the State of Ohio, *amicus* (herein referred to as OHIO).

6. Brief of the City of Seattle, *amicus* (herein referred to as SEATTLE).

II

AMICUS BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Counsel for the Anti-Defamation League insist upon presenting the question to this Court in the term of "racial quotas," (ADL 2, 17, 18) yet they never define that term. Respondents are sympathetic and sensitive to the "particular concern of the Jewish minority in this country over the use of a racial quota as a means of discriminating against Jewish minorities, both in Europe and in the United States." (*Id.*, p. 3.) We are also aware that the United States Congress has finally abandoned an immigration policy based on national origin quotas, a policy which was divisive in this country and unfair to persons seeking to emigrate to this country. But counsel are wrong when they argue that this case raises the issue of racial quotas. Respondents have never conceded that it does (Resp. Br., p. 2, n.1; p. 14, n.11), and petitioners have never claimed that it does.

A "quota" is defined in *Webster's Third New International Dictionary* as follows:

> "Quota—*n*—
>
> 1) A proportional part: SHARE; esp: the share or portion assigned to each in a division or to each member of a body
>
> . . . .
>
> 3) the number of immigrants allowed to enter a country in a particular year . . .
>
> 4) a *fixed* number or percentage of minority group members who may be admitted into some activity or institution . . .
>
> Quota—*vt:* to divide or *fix* by quotas."
>
> *Webster's Third New International Dictionary*, p. 1868, G. & C. Merriam Co., 1971. (Emphasis supplied.)

The only quota that concededly was fixed in this case was that set by the University for the number of seats open in the Law School class to which petitioner DeFunis sought admission, *i.e.*, 149 places to be filled from a pool of 1,601 applicants.

As has been well stated by Mr. Jack Greenberg and his associates and as the record in this case bears out, the University of Washington and its Law School aimed for a goal of greater representation of certain racial minorities in its Law School in order to improve the legal education of all of the students in the Law School and to increase the representation of such minorities in the legal profession. (NAACP, INC., p. 8.)

As Ms. Marian Wright Edelman stated in CHILDREN'S DEFENSE FUND, page 64:

> ". . . If the petitioner had shown that the school, in 1971, admitted a rigid 'quota' of minority applicants or admitted actually 'unqualified' minority applicants, this would be a difficult case . . . but the petitioner did not make any such showing.
>
> The most that the record reveals is that the Law School sought a 'reasonable representation' of minority students —not a 'quota' . . ."

Ms. Edelman goes on to observe, *id.*, at 65, that rather than setting quotas or ratios the University of Washington's "goal" was "reasonable" representation which was both highly flexible and consistent with the overall "discretionary" nature of its admissions process. (*See also* CLEO 20.)

We agree with Professor Cox that questions relating to "fixing a specific numerical target for the admission of at least minimally qualified minority appplicants . . ." be reserved for another case which presents such issues in its record. (HARVARD, pp. 50-51.)

Since the Anti-Defamation League brief is arguing a question which is not presented by the record in this case, it should be disregarded by this Court.

III

AMICUS BRIEF OF THE AFL-CIO

Counsel for the AFL-CIO, after reciting its own efforts in achieving greater minority representation within its affiliated unions under its federally-funded "Outreach" program (AFL-CIO, pp. 6-9), argues that while consideration of race is essential for the purpose of bringing greater minority representation into the journeyman trades, it is not only unessential but unconstitutional for the University of Washington and other higher education institutions to do the same when operating their "apprenticeship" programs for the professions.

Respondent University of Washington is well aware of the struggle to obtain greater minority representation in the construction trades. As a major federally-funded contractor, it has been a party to important litigation seeking to compel the building trades in the Seattle area to achieve greater minority membership in their work force. *See, e.g., State of Washington; Board of Regents, University of Washington; et al. v. Baugh Construction Company et al.; Asbestos Workers, Local 7, et al.;* U.S.D.C. W.D., Wash., Northern Division, Civil Action No. 8552; *United States v. Ironworkers, Local 86*, 443 F.2d 544, (C.A. 9), *cert. denied* 404 U.S. 984.

The AFL-CIO seems to be using this case to ask the Court to reverse those important courts of appeals' decisions upholding affirmative action employment programs in the construction industry which this Court has denied review. (AFL-CIO, pp. 21-24.) Those cases are carefully discussed by the City of

Seattle in its *amicus curiae* brief filed herein. (SEATTLE, pp. 9-11.)

Those cases support an affirmance in this case. If they are right, then this case, *a fortiori*, should be affirmed since it is specifically concerned with an important element missing in those cases, *i.e.*, the goal of achieving a better educational program for *all* the students in the Law School. (*Cf.* HARVARD, pp. 19-29; CHILDREN'S DEFENSE FUND, p. 45; *see, also*, LEGAL AID, pp. 39, 50-51; DEANS, p. 22; LCCR, pp. 27-28; ABA, pp. 18-19; NOW, pp. 14-15; OHIO, pp. 17-18; BLACK LAWYERS, p. 9.)

Respondents believe that the decisions which the AFL-CIO attacks in its brief are right. We do not believe that this case should provide a vehicle for their reversal.

CONCLUSION

Respondents believe that Ms. Marian Wright Edelman stated it well in the conclusion to her brief (CHILDREN'S DEFENSE FUND, p. 68):

> "No doubt, it is tempting to some to believe that the job is over, that now we all can relax. The 1960's are behind us, to be sure. But the task we set for ourselves then will not be accomplished quickly; surely it has not been accomplished yet. From the Congress to the Executive and down to smaller state institutions like the University of Washington Law School, Americans have grasped the tool of 'affirmative action' and have been using it reasonably and effectively. The potential for real progress can now be seen.
>
> The question here is whether the Court will now take that tool from the hands of those who have been using it for almost half a decade now. We urge the Court not to do so, and let the progress along this historic path continue."

For the reasons set forth in respondents' briefs and in those of the *amici* supporting them, we urge that the judgment of the Supreme Court of Washington in this case be affirmed.

Respectfully submitted,

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February 19, 1974

APPENDIX A

OFFICE OF THE ATTORNEY GENERAL
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January 28, 1974

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Re: DeFunis et al. v. Odegaard et al.
U. S. Supreme Court No. 73-235

Dear Mr. Braverman:

This will acknowledge receipt of your letter of January 25, 1974, on this date. You request our consent to the filing of an *amicus* brief in the above matter supporting the "apppellants." Briefs of the appellants/petitioners were due on January 3, 1974, and were received by us at that time. While two amicus briefs in support of the petitioners were filed late with our consent, we were advised well in advance of the content of those briefs.

Our own briefs have now gone to the printer and will be filed with the Court on the day they are due, i.e., February 1, 1974. Since the matter has now been scheduled for argument on February 26, 1974, we do not see how we can reasonably consent to your filing a brief at this late date. Therefore, we are not giving our consent on behalf of the respondents as you have requested. I am sorry that we cannot be more accommodating.

Very truly yours,
/s/
James B. Wilson
Senior Assistant Attorney General
Chief, University of Washington
Division

JBW/gg
cc: Lycette, Diamond & Sylvester
Dean Richard S. L. Roddis
AIR MAIL